

---

**(2008) 08 CAL CK 0003**

**In the Calcutta High Court**

**Case No :** G.A. No's. 2542 and 2617 of 2008 and A.P.O. No's. 200 of 2004 and 281 of 2007

Niraj Kumar Bohra

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

---

**Date of Decision :** 22-08-2008

**Acts Referred:**

Arbitration Act, 1940 — Section 20(4)  
Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(7), 11(8), 16  
Constitution of India, 1950 — Article 136

**Citation :** AIR 2009 Cal 59

**Hon'ble Judges :** Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

**Bench :** Division Bench

**Advocate :** Jayanta Kumar Mitra, Moloy Kumar Ghosh, Ambar Majumdar and Basudeb Mukherjee, for the Appellant; P.K. Dutta and N.R. Mukherjee, for the Respondent

**Final Decision :** Dismissed

---

## Judgement

Ashim Kumar Banerjee, J.—Being satisfied with the grounds mentioned in the application delay is condoned.

2. The review applicant entered into an agreement with the respondent railways for performing the job as mentioned in the work order. Such agreement provided that the General Conditions of Contract and Specification Standards 1999 would apply. The General Conditions contained an arbitration clause. Clause 63.3(a)(iii) stipulated as follows:

63.3(a)(iii). It is a terms of this contract that no person other than a gazetted railway officer should act an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to the arbitration at all.

3. As per the arbitration clause since the work value was more than rupees three lacs two Arbitrators were to be appointed, one to be nominated by the Contractor and other to be nominated by the Railways and the third Arbitrator being an

umpire would be appointed by the two Arbitrators. It was also provided that all the three Arbitrators must be Railway Gazetted Officers. In terms of Clause 3(b) the Railway was to send a panel to the Contractor containing more than three names and the Contractor was entitled to suggest a panel of three persons out of the said list. The General Manager would then appoint one Arbitrator out of the said panel as Contractor's nominee and then appoint a second Arbitrator of equal status as Railway's nominee either from the said panel or from outside the said panel. In the instant case the appellant/contractor asked the Railway Authorities to refer the disputes to arbitration. Despite repeated reminders Railway did not act upon such request. The review applicant approached the Hon'ble Chief Justice u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act of 1996") to appoint an Arbitrator. The Hon'ble Chief Justice nominated a retired Judge of this Court as Sole Arbitrator. The Arbitrator entered upon reference. The Railways filed counter statement wherein they took the plea that his appointment was not in terms of the contract. It was the case of the applicant that the Railways did not press such plea till 44th sitting and allowed the Arbitrator to go into the dispute. At the 44th sitting Railways insisted that such plea must be decided by the Arbitrator u/s 16 of the said Act of 1996. The Arbitrator at the 48th meeting decided such preliminary issue and rejected the same. Ultimately the Arbitrator published an award in favour of the appellant. The Railways filed an application for setting aside of the award before the learned single Judge on the grounds mentioned in the said application. The learned single Judge by judgment and order dated May 17, 2007 allowed the said application and set aside the award principally on the ground that in view of the non-obstante clause being Clause 63.3(a)(iii) appointment of the Arbitrator was erroneous and the award on the said ground was liable to be set aside. His Lordship relied on the three Apex Court decisions which are as follows:

(i) 2000 II ALR 2 (SC) : 2000 AIR SCW 4953 (A. Mohammad Yunus (Dead) by L.Rs. v. Food Corporation of India).

(ii) 2003 Volume-III Arbitration Law Reporter Page 557 (SC): AIR 2004 SC 1034 (Union of India v. Sohan Lal Puglia).

(iii) 2004 Volume-X Supreme Court Cases Page 504 : 2005 AIR SCW 3389 (Union of India v. M.P. Gupta).

4. His Lordship also rejected the plea of waiver taken by the applicant u/s 4 of the said Act of 1996 by holding that once the Arbitrator had accepted the said objection and dealt with the same on merit Section 4 would have no application.

5. Being aggrieved and dissatisfied with the judgment and order of the learned single Judge the applicant preferred the instant appeal. This Court initially directed Paper Book to be filed. Despite such direction being given the appellant did not file any Paper Book. The appellant appeared before us on May 14, 2008 when we dismissed the appeal by observing as follows:

Despite direction of this Court, no paper book has been filed. On perusal of the order under appeal we find that the learned single Judge set aside the award relying on the Apex Court decision reported in 2004 10 SCC 504 : 2005 AIR SCW 3389. No purpose would be served by keeping the appeal pending. Accordingly, the appeal is dismissed without any order as to costs.

6. The review applicant has now come with this application, inter alia, on the ground that both the learned Single Judge as well as the Division Bench did not consider the Constitution Bench judgment of the Apex Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, .

7. Mr. Jayanta Kumar Mitra, learned senior counsel appearing in support of the application contended that the judgment and order of this Court suffered patent defect as it failed to consider the Constitution Bench judgment in the case of Patel Engineering (supra). Hence, the application for review was maintainable.

8. Mr. Pradip Dutta, learned senior counsel appearing for the respondent on the other hand contended that the appellant urged all points available to them before the Bench. This Bench following the Apex Court decision in the case of A. Md. Yunus 2000 AIR SCW 4953 (supra) affirmed the judgment and order of the learned, single Judge. Hence, only remedy available to the appellant was to approach the Apex Court as against the judgment and order of the Division Bench. The review application was thus not maintainable.

9. Mr. Mitra on the issue of maintainability relied on the single Bench decision of this Court reported in Tinkari Sen and Others Vs. Dulal Chandra Das and Others, and the Division Bench decision of this Court in the case of Union of India (UOI) and Others Vs. Lachman Singh and Others, . Mr. Mitra also relied upon a single Bench decision of one of us in the case of Samir Kumar Naskar v. Director of School Education reported in 2006 1 CLT 134.

10. We have considered the rival contentions on the issue of maintainability. We have also considered the decisions cited at the bar on the issue. High Court is a Court of record. Applicant contended that we had not considered a Constitutional Bench Judgment of the Apex Court on the issue. Whether such decision would change our ultimate conclusion in the matter is a question to be considered on merit. We, however, feel that it would be a miscarriage of justice if we dismiss this application in limine without examining the ratio decided in the said Constitution Bench decision in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, We have perused the said decision. We would deliberate on the same little later. We, however, admit that such decision would have a bearing on the issue involved in the instant case. Merely on the ground that the applicant could have cited the said decision before us at the time of hearing which he failed to do we should not reject the application for review in limine. We hold the application maintainable.

11. Let us now deal with the issue on merit.

12. In the case of *Union of India v. Sohanlal Puglia* AIR 2004 SC 1034 (supra) the Apex Court observed that u/s 20(4) of the Arbitration Act, 1940 the Court after being satisfied that there existed an arbitration clause between the parties and the disputes had arisen by and between them should direct such arbitration agreement to be filed in Court. The Court should also make an order of reference to the Arbitrator to be appointed in terms of the agreement and if not possible to the Arbitrator to be appointed by the Court. In the case of *A. Md. Yunus* AIR 2000 SCW 4953 (supra) a clause identical to Clause 63.3(a)(iii) herein was considered by the Apex Court. The Apex Court observed, the terms of the contract clearly stipulated that in case there is no agreement on the appointment of Sole Arbitrator then no person other than the person to be appointed by the FCI can act as an Arbitrator and where it is not possible to appoint such an Arbitrator, then the matter is not to be referred to arbitration at all. The Apex Court upheld the order of the Division Bench setting aside the award contrary to such clause. In the case of *M.P. Gupta* 2005 AIR SCW 3389 (supra) the Apex Court held the same way as had been done in the case of *A. Md. Yunus* (Supra). Mr. Mitra, however, tried to distinguish this three cases by contending that all those three cases were under the old Act of 1940 whereas the present case was under the Act, 1996. According to Mr. Mitra Section 11 was interpreted by the Apex Court in the case of *S.B.P. and Co. Vs. Patel Engineering Ltd.* and Another, The earlier issue of the Apex Court in the case of *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.,* was overruled. In the case of *Konkan Railways* (supra) the Apex Court held that the order u/s 11(6) passed by the Chief Justice was an administrative order whereas the Apex Court in the case of *Patel Engineering* held that the said order was a judicial order. Mr. Mitra contended that once the Chief Justice appointed Arbitrator u/s 11(6) by a judicial order such order reached finality unless it was set aside by the Apex Court in an application under Article 136 of the Constitution. In the instant case the order of the Hon'ble Chief Justice was not assailed by the railways. The railways accepted the said order, submitted to the jurisdiction of the Arbitrator by participating in the said reference. Hence, they waived their right, if any, u/s 4 of the said Act of 1996 and as such they were precluded to raise such objection before the Arbitrator and in any event the Arbitrator did not have any power to decide on the said issue u/s 16 as held by the Apex Court in the case of *Patel Engineering* (supra). Mr. Mitra took us to various paragraphs of the decision of the Apex Court in the case of *Patel Engineering* (supra) to support his contention.

13. Mr. Dutta, however, distinguished the decision in the case of *Patel Engineering* (supra) by contending that the decision in the case of *Konkan Railways* (supra) was holding the field when the subject arbitration took place. He referred to paragraph 47 of the decision in the case of *Patel Engineering* (supra) where the Apex Court summed up their finding on the issue. Mr. Dutta contended that such decision of the Apex Court was prospective in nature and could not have any application in the instant case.

14. We have considered the rival contentions. On perusal of the Apex Court

decisions in the case of *Union of India v. Sohanlal* AIR 2004 SC 1034, *A. Md. Yunus* AIR 2004 SCW 4953 (supra) and *M.P. Gupta* 2005 AIR SCW 3389 (supra) and on a combined reading all those three decisions it is clear that the parties agreed to have arbitration only through railway gazetted officers and in case it was not possible they would not go for arbitration. The Hon''ble Chief Justice could not have appointed an Arbitrator who was not a railway gazetted officer. Appointment of retired Judge in the instant case as per the Apex Court decision discussed in the preceding paragraph was contrary to the arbitration agreement. Mr. Mitra relied on Sub-section (7) of Section 11 where it was provided that a decision of the Hon''ble Chief Justice under Sub-section (6) was final and binding upon the parties. We are unable to accept such contention. On a combined reading of all the Sub-sections u/s 11 it would appear to us that such provision is a complete code by itself. Once there is an arbitration clause contained in an agreement between the parties or an independent arbitration agreement and if the parties fail to appoint Arbitrator in terms of the agreement any party to the agreement is entitled to approach the Hon''ble Chief Justice for appointment of an Arbitrator. However, appointment of Arbitrator even by the Chief Justice must be in accordance with the arbitration agreement and cannot be dehors the arbitration agreement. The parties herein agreed that they would go for arbitration only through the railway gazetted officer. The applicant approached the Railways invoking Clause 63. The Railways failed to send the panel. Hence, the applicant was entitled to apply u/s 11(6) which he did. The Hon''ble Chief Justice in such event could only appoint a railway gazetted officer as Arbitrator. The agreement specifically provided that there would be no arbitration at all save and except through an Arbitrator or Arbitrators having qualification of railway gazetted officers.

15. Let us now consider Mr. Mitra's contention on the applicability of the ratio decided in the case of *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*,

16. Paragraph 47 of the said decision is quoted below:

47. We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India u/s 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power u/s 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid

arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority u/s 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the Arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order an appeal will lie against that order only under Article 136 of the Constitution of the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application u/s 11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Railways Corporation Limited v. Rani Construction (P) Limited* and orders u/s 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid all objections being left to be decided u/s 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications u/s 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court u/s 11(6) of the Act, the appointments orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.*, is overruled.

17. If we apply the ratio in the case of *Patel Engineering AIR 2006 SC 450* (supra) we must reverse our judgment. Question remains, can we do so? In

paragraph 47(x) the Apex Court made it clear that appointment of Arbitrators prior to the said decision would be guided by the decision in the case of Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., and in those cases the Arbitral Tribunal would be entitled to decide objections u/s 16. The Apex Court further made it clear that from the date of delivery of judgment in the case of Patel Engineering the order appointing Arbitrator by the Hon''ble Chief Justice would be final and binding upon the parties and neither party would be entitled to question the same before the Arbitrator in case any of the party is aggrieved by such appointment only course left open to him is to apply before the Apex Court under Article 136 of the Constitution.

18. We fully appreciate Mr. Mitra's agony. The respondent took the plea in their counter statement, however, did not raise that positively before the Arbitrator until the 44th sitting involving huge cost and expenses. We, are, however, unable to consider such contention in view of the clause quoted supra. In case of a dispute the litigants are entitled to approach the Court of law for resolution of such dispute if such litigant has a valid cause of action in law. The parties, however either before such cause of action arises or after the dispute is cropped up may agree by agreement to resolve their disputes by alternate dispute resolution mechanism. The parties herein agreed before hand that they would resolve their disputes, if any, through a particular mode by a qualified Arbitrator as per the qualification stipulated in the agreement. The parties agreed that in case it was not possible they would not go for arbitration. Hence, appointment of an Arbitrator who is not qualified in terms of Clause 63.3(a)(iii) would be a situation compelling the parties to resolve their disputes through arbitration although not agreed upon by them. Law does not permit us to do so.

19. We, thus, hold that the appointment of Arbitrator in the instant case was dehors the agreement entered into by and between the parties and such appointment was invalid in the eye of law. As a consequence the award was bad and was rightly set aside by the learned single Judge. We affirmed the decision of the learned single Judge by our judgment and order under review. We do not find any scope of reversing our judgment and order impugned herein.

20. Application, thus, fails and is hereby dismissed. There would be however, no order as to costs. Urgent xerox certified copy would be given to the parties, if applied for.

Tapas Kumar Giri, J.

21. I agree.